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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of	)	
	)	
Streamlining Broadcast EEO Rule and Policies,	)	**MM Docket No. 96-16**
Vacating the EEO Forfeiture Policy Statement	)	
and Amending Section 1.80 of the Commission's	)	
Rules To Include EEO Forfeiture Guidelines	)	

To: The Commission

PETITION FOR RECONSIDERATION

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EXECUTIVE SUMMARY

The newly promulgated religious belief "guidelines" specified in Order and Policy Statement, FCC 98-19, 63 Fed. Reg. 11376 published March 9, 1998) should be redrafted and reintroduced as actual "rules" for five separate reasons. First, they were ambiguously adopted as "guidelines," as an "order," and as purported "rules," without following the necessary notice and comment procedures of the Administrative Procedures Act, 5 U.S.C. §553 *et seq.*

Second, the "guidelines" are not rules, and are unconstitutionally vague and overbroad. Their vagueness would also lead to unconstitutional unbridled discretion in their application.

Third, the underlying EEO standards that the guidelines continue to apply to religious broadcasters are unconstitutional under the principles set forth in Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S.Ct. 2097 (1995).

Fourth, the guidelines cannot meet the compelling state interest standard of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb ("RFRA"). As a result, the continued application of the Commission's EEO rules to religious broadcasters would not pass strict scrutiny in a legal challenge.

Finally, the application of an intra-religious EEO standard necessarily fails. The FCC is not constitutionally equipped to make ecclesiastical determinations about the centrality or efficacy of religious hiring decisions. In addition the proposed monitoring of religious groups to make certain that there is sufficient compliance within the religious order to the EEO standards is an unconstitutional entanglement of the State in the affairs of the Church.

For these reasons, and others set forth herein, Petitioners respectfully request that the FCC reconsider, redraft, and resubmit these guidelines for formal adoption in full compliance with Amos, Title VII and RFRA.

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PETITION FOR RECONSIDERATION

I. INTEREST OF PETITIONERS -

The Order and Policy Statement; FCC 98-19, released February 25, 1998, was published in the Federal Register on March 9, 1998 (63 Fed. Reg. 11376). This Petition is timely filed pursuant to Commission Rules 1.4(b)(1) and 1.429(d), 47 CFR §§ 1.4(b)(1) & 1.429(d).

The American Center for Law and Justice ("ACLJ") is a nonprofit legal and educational organization dedicated to preserving religious freedoms. Some of the religious liberty cases which the ACLJ and its lawyers have successfully litigated are Lamb's Chapel v. Center Moriches Union Free School District, 113 S.Ct. 2141 (1993); Westside Community Schools v. Mergens, 496 U.S. 226 (1990); and Board of Airport Commissioners v. Jews for Jesus, 482 U.S. 569 (1987).

The ACLJ files this Petition on behalf of television religious broadcaster Radiant Life Ministries, Inc., WLXI TV, Greensboro, North Carolina, and radio religious broadcaster New Covenant Educational Ministries, Inc., WNCM FM, Jacksonville, Florida.

Petitioners did not comment on Streamlining Broadcast EEO Rule and Policies, MM Docket No. 96-16, 11 FCC Rcd 5154 (1996), because the document never mentioned changing the standards to be applied to religious broadcasters. Nor did it refer to a change in the Commission's prior policy as enunciated in King's Garden v. FCC, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974).

In fact, King's Garden was never mentioned in the document. Additionally, no reference was made to the standards set forth in Corporation of Presiding Bishops v. Amos, 483 U.S. 327 (1987), or that the Commission was examining the possibility of changing its Equal Employment Opportunity standards to comport with that ruling.

The purpose of the filing of this Petition is to request the FCC to reconsider these new guidelines and the process by which they were adopted, and to preserve all appeal rights to insure religious broadcasters are afforded their full constitutional and statutory rights as held in Amos.

II. INTRODUCTION -

The newly promulgated "guidelines" should be redrafted and reintroduced as actual "rules" for five separate reasons. First, they were ambiguously adopted as "guidelines," as an "order," and as purported "rules," without following the necessary notice and comment procedures of the Administrative Procedures Act, 5 U.S.C. § 553 *et seq.*

Second, the "guidelines" are not rules, and are unconstitutionally vague and overbroad. Their vagueness would also lead to unconstitutional unbridled discretion in their application.

Third, the underlying EEO standards that the guidelines continue to apply to religious broadcasters are unconstitutional under the principles set forth in Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S.Ct. 2097 (1995).

Fourth, the guidelines cannot meet the compelling state interest standard of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb ("RFRA"). As a result, the continued application of the Commission's EEO rules to religious broadcasters would not pass strict scrutiny in a legal challenge.

Finally, the application of an intra-religious EEO standard necessarily fails. The FCC is not constitutionally equipped to make ecclesiastical determinations about the centrality or efficacy of

religious hiring decisions. In addition, the proposed monitoring of religious groups to make certain that there is sufficient compliance within the religious order to the EEO standards is an unconstitutional entanglement of the State in the affairs of the Church.

For these reasons, and others set forth herein, Petitioners respectfully request that the FCC reconsider, redraft, and resubmit these guidelines for formal adoption in full compliance with Amos, Title VII and RFRA.

III THE LACK OF NOTICE AND COMMENT PRIOR TO THE ADOPTION OF THE NEW RULES/GUIDELINES VIOLATED THE ADMINISTRATIVE PROCEDURES ACT

The federal Administrative Procedures Act ("APA") generally provides that legislative rules are to be promulgated in accordance with formal notice and comment rulemaking. 5 U.S.C. § 553 *et seq.* That process did not occur with these proposed "rules guidelines," for nowhere in the original Streamlining Broadcast EEO Rule and Policies, MM Docket No. 96-16, 11 FCC Rcd 5154 (1996), was any mention made concerning changing the FCC's Equal Employment Opportunities (EEO) rules with regard to religious broadcasters. As noted in the Separate Statement of Commissioner Harold W. Furchgott-Roth at 2:

> The above-described modification of our renewal procedures should be clearly established in a legally enforceable manner. Unfortunately, the Commission's current processing "guidelines," as they have been termed, are not set forth in any duly-promulgated regulations. Rather, they are merely the product of agency custom – a situation that can all too easily lead to inconsistent and possibly arbitrary application – and were apparently developed without notice or comment.

Without explicit notice of the intention to change the rules with regard to religious broadcasters, these guidelines are unenforceable and will not withstand an APA related challenge.

Extensive precedent shows that the APA's formal notice requirement serves three distinct purposes, none of which were addressed here. First, notice improves the quality of agency rulemaking

by insuring that the agency regulations "will be tested by exposure to diverse public comment." Small Refiner Lead Phase-Down Task Force v. U.S. Environ. Protection Agency, 705 F.2d 506, 547 (D.C. Cir. 1983) (citations omitted). The notice and comment procedure assures that the public and persons being regulated are given an opportunity to participate, provide information and suggest alternatives, so that the agency is educated about the impact of its proposed rule and can make a fair and mature decision. NLRB v. Wyman-Gordon Co., 394 U.S. 759 (19 69); Lewis - Mota v. Sec of Labor, 469 F.2d 478 (2d Cir. 1972); Texaco, Inc. v. Federal Power Comm'n, 412 F.2d 740 (3d Cir. 1969).

Second, notice and the opportunity to be heard are essential components of fairness to affected parties. Small Refiner, 705 F.2d at 547. Third, by giving affected parties an opportunity to develop evidence in the record to support their objections to the rule, notice enhances the quality of judicial review. *Id.*

The specificity of the contents of a proposed rulemaking are vital for the rule's viability after adoption. For example, 5 U.S.C. § 553(b) requires reference to the legal authority under which the rule is proposed, and either the terms or substance of the proposed rule or a description of the subject or issues involved. Streamlining Broadcast EEO Rule and Policies, MM Docket No. 96-16, 11 FCC Rcd 5154 (1996), gave no notice about the possibility of the adoption of new EEO rules applicable to religious broadcasters, and rules which would no longer adhere to King's Garden v. FCC, 498 F.2d 51 (D.C. Cir.), *cert. denied,* 419 U.S. 996 (1974), but instead would purport to follow the mandates of Amos. Neither of those cases were mentioned in the original notice, nor were any of the underlying principles of religious freedoms articulated in those cases discussed.

The only reason that religious broadcasters filed any comments was because the FCC requested comments about general changes to its EEO policy in light of the Supreme Court's ruling in Adarand. The FCC's reliance upon those comments as a showing that sufficient notice was given

would be severely misplaced. Testimonial evidence on this topic would reveal that none of the comments were directed at any specific proposal by the FCC concerning King's Garden, Amos, or religious broadcasters, but instead was based on a hope (rather than an understanding) that these issues might be addressed by the FCC at some future date.

In fact, the FCC's underlying opinion in Lutheran Church-Missouri Synod v. FCC, No. 97-1116 (D.C. Cir. 1998), that it could still adhere to the old King's Garden standard and disregard the religious basis for the Lutheran Church's hiring practices, was contemporaneous with the original notice for this rulemaking. That position was maintained in the FCC's appellate memoranda to the D.C. Circuit. It was only the Friday before oral argument that the FCC notified the Clerk of Court for the D.C. Circuit that it was considering reversing its prior position and adopting a new rulemaking.[1]

Such failure to publish a notice of proposed rulemaking as required by the APA results in the invalidation of the ensuing rule. Guernsey Memorial Hospital v. Sec. Of Health & Human Serv., 996 F.2d 930 (6th Cir. 1993); Clever Idea Co. v. Consumer Product Safety Com., 385 F. Supp. 688 (E.D.N.Y. 1974); Texaco v. Federal Power Comm'n, 412 F.2d at 744-45. Indeed, notice of a proposed rulemaking is not adequate where it fails to provide an accurate picture of the reasoning that led the agency to the proposed rule because interested parties will not be able to comment meaningfully upon the agency's proposal. Connecticut Light & Power Co. v. Nuclear Regulatory Com., 673 F.2d 525 (D.C. Cir.), *cert denied*, 459 U.S. 835 (1982). Even at this juncture, with the rulemaking published in the Federal Register, it is far from clear what the FCC has accomplished.

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[1] Whether the new rulemaking would pass muster under the APA was an issue argued before the D.C. Circuit by the parties at oral argument in the Lutheran Synod case.

Inadequate notice was given of this proposed rulemaking, if that is what it was,[2] and therefore, religious broadcasters were unable to address the issues now raised by these newly adopted guidelines. Before such guidelines can be adopted, the requirements of the APA must be met. As these guidelines presently stand, however, they are plainly invalid under the APA.

IV. THE NEW GUIDELINES ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD AND THEREFORE VIOLATE TRADITIONAL DUE PROCESS STANDARDS

Due process requires that religious broadcasters (both radio and television) have actual notice of what the FCC believes its EEO regulations require of them. The new guidelines are not even rules, but are instead "guidelines" presumably for the adoption of rules. As noted in a March 9, 1998, letter to the D.C. Circuit in Lutheran Church-Missouri Synod v. FCC, No. 97-1116 (D.C. Cir. 1998), from FCC Associate General Counsel Daniel M. Armstrong (copy attached):

> Accordingly, per request of Commissioner Furchgott-Roth, we would like to make clear that he believes it would be inappropriate to precommit [sic] to any result concerning the merits of adjudication on remand and thus wished to make no representations about what sort of order should ultimately be adopted.

Thus, at least one FCC Commissioner discerns the obvious -- it is unclear what is encompassed within these guidelines.

It is well-settled that a law which is unduly vague, lacking "ascertainable standards of guilt," violates the Due Process Clause of the Fifth and Fourteenth Amendments and is therefore unconstitutional. Winters v. New York, 333 U.S. 507, 515 (1948). These new guidelines are phrased "in

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[2] Nowhere is there a representation in the "guidelines" that this paper was anything other than a policy statement. Indeed, paragraph three states that the guidelines are "a nonbinding policy statement for television licensees and permittees [sic]." This and other statements throughout are a tacit admission that these are not rules. Therefore, "requirements" of "compliance" with the proposed EEO "guidelines are inherently unenforceable, and attempts to enforce these vague guidelines could easily be construed to be an *ultra vires* action by the Commission.

terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). As a consequence, because the guidelines give broadcasters no discernable basis for understanding what is permitted, and the concomitant basis for the imposition of penalties (as in the Lutheran Synod case), the guidelines violate the "first essential of due process of law[, "fair warning"].[3]

When the government undertakes to regulate First Amendment activities, as here, it must do so pursuant to a "narrow, objective, and definite standard," Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969), so that persons exercising their First Amendment rights will not be required to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." Grayned, 408 U.S. at 109 (internal quotation marks omitted). The standard of clarity to which enactments affecting free speech must adhere is far more stringent than that applied in other contexts. *See* Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498 (1982) ("If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply"); Smith v. Goguen, 415 U.S. 566, 573 (1974) ("Where a

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[3] The United States Supreme Court has explained that vague enactments and their ambiguous application are unconstitutional because they violate two fundamental principles of due process, "fair warning" and "nondiscriminatory enforcement."

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.[]

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (footnotes and quotations omitted).

statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts").

Evidently, these guidelines were developed as a response to the pending litigation in the Lutheran Synod case. Regardless of the amount of development that went into these regulations, they are imminently challengeable *prior to any attempt by the FCC to apply them to a single religious broadcaster.* "It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes." NAACP v. Button, 371 U.S. 415, 435 (1963). Challenges are "permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad." FW/PBS v. City of Dallas, 493 U.S. 215, 223 (1989). If the law is subject to application on an "as we go" basis, as here, then it is inherently vague and overbroad.[4]

Using these vague and overbroad guidelines as a foundation for developing further rules on an "as we go" basis, is a classic unconstitutional prior restraint on speech. City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 770 (1988) ("[e]ven if judicial review were relatively speedy, such review cannot substitute for concrete standards to guide the decision maker's discretion"); FW/PBS, 493 U.S. at 226 (". . . an ordinance which makes the peaceful enjoyment of freedoms which the

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[4] To this extent, the guidelines' citation of 47 U.S.C. § 334 as preventing the applicability of these overbroad regulations to television broadcasters is a misreading of what the Constitution mandates. Simply stated, a federal statute does not trump the mandates of the United States Constitution. Thus, if the Constitution requires the FCC to eliminate its EEO requirements with regard to religious broadcasters, then a federal statute cannot prevent this federal agency from adhering to that higher constitutional authority, and, in fact the Supremacy Clause requires it. This reliance on a purported statutory constraint to create a nonbinding policy for religious television broadcasters highlights the uncertainty associated with this statute.

Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms"). As noted in the Separate Statement of Commissioner Harold W. Furchgott-Roth at 2 in this regard: "Unfortunately, the Commission's current processing "guidelines," as they have been termed, are not set forth in any duly-promulgated regulations. Rather, they are merely the product of agency custom – *a situation that can all too easily lead to inconsistent and possibly arbitrary application* – and were apparently developed without notice or comment." (Emphasis added).

In reaction to this type of unbridled discretion in both interpretation and application of the law, the Supreme Court has

> previously identified two major First Amendment risks associated with unbridled licensing schemes: self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship "as applied" without standards by which to measure the licensor's action. *It is when statutes threaten these risks to a significant degree that courts must entertain an immediate facial attack on the law. Therefore, a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.*

Lakewood, 486 U.S. at 759 (emphasis added). Because these guidelines are unconstitutionally vague and overbroad, any type of enforcement of these guidelines by the FCC would necessarily be viewed as "arbitrary and capricious." Bechtel v. FCC, 10 F.3d 875, 878 (D.C. Cir. 1993).

These guidelines are unenforceable. As a result, different rules applicable to religious broadcasters should be developed in accordance with constitutional principles and the APA.

V. THE UNDERLYING EEO RACIAL AND GENDER HIRING/RECRUITMENT REQUIREMENTS IN THE GUIDELINES VIOLATE *ADARAND*.

The underlying EEO regulations violate Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). Thus, their surreptitious application to religious broadcasters hiring practices in the guidelines are unconstitutional.

The new guidelines state the following:

> Nothing in this order should be interpreted as permission to engage in employment discrimination against women and minorities. As stated previously, religious broadcasters must still recruit without limitation on the basis of race, color, national origin or gender from among those who share their religious affiliation or belief in filling positions at their stations. Religious broadcasters will also remain subject to Sections 73.2080(b) and (c) of the Commission's Rules, 47 C.F.R. §§ 73.2080(b) and (c), requiring broadcasting licensees to maintain a positive continuing program of specific practices designed to ensure equal employment opportunity, for persons who share their faith, in every aspect of station employment and practice. We hereby emphasize this continuing obligation notwithstanding any suggestion to the contrary in Lutheran Church/Missouri Synod, 12 FCC Rcd 2152, 2166 n.9 (1997), appeal pending. We shall also continue to require religious broadcasters to file Forms 396-A, 396 and 395-B, and will still examine their EEO programs at renewal time, as well as other relevant periods, to determine if they have complied with our EEO Rule, inquire further if there is evidence of lack of compliance, and take appropriate action if violations have occurred.

Streamlining Broadcast EEO Rule and Policies at 4 ¶ 9. As a primary matter, this paragraph is internally conflicted. In the first portion of the paragraph the FCC states that it will monitor religious broadcasters to insure that they do not discriminate against people based on race, ethnicity, or gender among their co-religionists.

The latter portion of the paragraph states that "we shall *also* continue to require religious broadcasters" to file the traditional EEO compliance forms, as well as determining whether there is sufficient compliance with the EEO rules. "Also" means "in addition to," "as well," or "besides."Webster's Third New International Dictionary (1993) at 62. It is, therefore, not untenable to read the paragraph as requiring religious broadcasters to comply with the "old" EEO regulations

as well as the new guidelines. This reading is not unreasonable in light of the fact that the "guidelines" are not rules, and that the "old" EEO regulations are, in fact, the present EEO regulations which have not been rescinded and remain in full force.

Assuming *arguendo* that this was not the intent of the FCC drafters, the guidelines still fail. The attempt to distinguish between "essential" religious positions (as opposed to "secondary" religious positions) which may require discrimination,[5] and the proposed monitoring for compliance are both unconstitutional. In addition, the underlying EEO hiring/recruitment requirements are unconstitutional.

As summarized in the Separate Statement of Commissioner Harold W. Furchgott-Roth at 3:

> Accordingly, today's action cannot, by itself, create any enforceable substantive right in religious broadcasters to be free from application of the EEO religious anti-discrimination provision, nor can it preclude the Commission from enforcing that provision against such broadcasters.

At best, therefore, these guidelines are an *indication* that the EEO requirements will be more narrowly applied than before. *Any* government-imposed race-based hiring or recruitment requirement, however, must be based on actual invidious discrimination against persons, rather than generalized eleemosynary desires to protect a group. Because the FCC's EEO racial/gender hiring requirements are based purely on policy considerations, they are unconstitutional. "Racial classifications of any sort must be subjected to 'strict scrutiny.'" Wygant v. Jackson Board of Ed., 476 U.S. 267, 285 (1986) (O'Connor, J., concurring). *See also* Richmond v. J.A. Croson Co., 488 U.S. 469, 493-494 (1989) (single standard for review of racial classification is "strict scrutiny"). Accordingly, when the Federal

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[5] This type of determination of what is an essential employment position to a religious group is the basis of the religious challenges in the Lutheran Church/Missouri Synod case, and presumably, was the catalyst for the development of these guidelines in the first place. The fact that the FCC still attempts to make these assessments indicates that it still fails to "get it," and still fails to understand that ecclesiastical determinations made by federal agencies are unconstitutional.

Communications Commission implements "guidelines" for racial hiring requirements such as the EEO recruitment/hiring rules at issue here, it "must ensure that before it embarks on [such] an affirmative action program, it has convincing evidence that remedial action is warranted." Wygant, 476 U.S. at 277.

The Supreme Court has been unequivocal that federal race-based employment requirements without evidence of past discrimination against individuals are unconstitutional. The Supreme Court reversed its prior ruling in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), which previously upheld the FCC's minority preference rules, by declaring that the government lacks a compelling interest in imposing such race-based regulations upon broadcasters. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 225 (1995). The Adarand Court held that "*Metro Broadcasting* undermined important principles of this Court's equal protection jurisprudence, established in a line of cases stretching back over fifty years . . . ." Adarand, 515 U.S. at 231.

The scheme in question in Adarand provided financial incentives to general contractors to hire subcontractors who had been certified as disadvantaged business enterprises on the basis of certain race-based assumptions. *Id.*, 515 U.S. at 225- 228. Broadcasters have previously enjoyed the benefit of broadcasting only by adhering to the FCC's Equal Employment Opportunity race-based hiring/recruitment requirements.

In order to pass the strict scrutiny test as enunciated in Adarand, the guidelines must adduce evidence that its racial/gender employment requirements are based upon evidence that religious broadcasters have discriminated against specific persons *because* of their race or gender. As the Supreme Court held in Adarand in this regard:

> . . . the Fifth and Fourteenth Amendments to the Constitution protect *persons* not *groups*. It follows from that principal that all governmental action based on race - a *group* classification long recognized as in most circumstances irrelevant and therefore

> prohibited - should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection has not been infringed.

Adarand, 515 U.S. at 227 (emphasis in original, citations and internal quotation marks omitted). There is no evidence that the guidelines racial/gender recruitment policy is based upon anything other than its own internal benevolent policy considerations. Thus, the guidelines which apply broadly to racial and gender *groups* (as opposed to *persons*) is not only inherently flawed, it is also unconstitutional because of its lack of underlying factual justification.

Invoking the mantra of "diversification" does not fulfill the evidentiary requirement that strict scrutiny necessarily demands. As the Supreme Court held:

> What [dissenting Justice Stevens] fails to recognize is that strict scrutiny *does* take "relevant differences" into account - indeed, that is its fundamental purpose. The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking.

Id. at 228. *See also* Hopwood v. State of Texas, 78 F.3d 932, 944-48 (5th Cir.), *rehearing denied* 84 F.3d 720, *cert. denied* 117 S.Ct. 608 (1996) ("diversity" as a justification for racial admissions preferences for the University of Texas School of Law not a compelling interest). The FCC has had a number of years to produce evidence that the race-based recruitment/hiring requirements in its EEO regulations were justified by specific instances of invidious discrimination. Rather than meet its obligation to do so, the FCC now erroneously attempts to place the burden of proof on religious broadcasters to show compliance with its EEO hiring/recruitment policies. However, it is the FCC which bears the evidentiary burden to support a narrowly tailored compelling governmental interest here. Adarand, 515 U.S. at 235. Since no such showing has been made, these EEO racial recruitment "guidelines" fail the strict scrutiny test.

For constitutional purposes, lip service to "diversity" is insufficient justification for the constitutional infringements here. As this Court held in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993):

> The Commission's uncertainty about the practical effects of its [ownership] integration policy is not limited to the question of how long [the policy] persists. Despite its twenty eight years of experience with the policy, the Commission has accumulated no evidence to indicate that it achieves even one of the benefits that the Commission attributes to it . . . Without adopting the Panglossian view that all economic arrangements that exist must necessarily be efficient, one should still be skeptical when regulatory agencies promote organizational forms that private enterprise would not otherwise adopt.

10 F.3d at 880. Because the Commission could offer the Bechtel Court no factual basis for upholding its rules, the D.C. Circuit found the imposition of those rules to be arbitrary and capricious. *Id.* at 887. The same standard would be applied here, and the guidelines would also likely be found to be facially arbitrary and capricious.

VI. THE FCC MUST DEMONSTRATE A COMPELLING REASON FOR APPLYING ITS EEO REQUIREMENTS OF RELIGIOUS BROADCASTERS

The federal Religious Freedom Restoration Act ("RFRA"), 107 Stat. 1488 (1993), signed into law by President Clinton on November 16, 1993, expressly prohibits the type of governmental intrusion into religious freedoms proposed here. Section 3(a) explicitly requires that the FCC's race-based recruitment/hiring requirements be tempered in relation to the religious liberty rights at stake for religious broadcasters: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." RFRA § 3(a).

In City of Boerne v. Flores, 117 S.Ct. 2157 (1997), the Supreme Court held that Congress lacked authority under section 5 of the Fourteenth Amendment to enact RFRA, and hence RFRA is unconstitutional as applied to state governments. The Boerne rationale does not apply to Congress'

actions in the federal sphere, however. Indeed, the Commission recognized the applicability of RFRA in the Lutheran Church/Missouri Synod appeal.

RFRA sets forth two insurmountable obstacles for the FCC in the application of its race-based hiring/recruitment standards here. RFRA first states that the government may burden religious exercise *only* if the regulation is "in furtherance of a compelling governmental interest." RFRA § 3(b)(1). Mandating that religious affairs be conducted in a manner foreordained by the FCC, and coercing association (or disassociation) cannot be a compelling state interest.

For example, many religions discriminate on the basis of gender because of their religious beliefs (*e.g.*, Priests, Monks and Nuns in the Catholic faith, and male Rabbis in the Orthodox Jewish faith). Allowing religious faiths to so discriminate fulfills the requirements of the Free Exercise Clause of the First Amendment. *See* Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 868 (2d Cir.), *cert. denied*, 117 S.Ct. 608 (1996).

Second, RFRA requires that religious exercise may *only* be burdened if the government is employing "the least restrictive means of furthering that compelling governmental interest." RFRA § 3(b)(2). The least restrictive means for the government here is not to enforce racial/gender based hiring/recruitment standards that are unconstitutional, regardless of whether such standards are applied to religious or secular broadcasters.

Third, RFRA also mandates that the government must "demonstrate" that it has used the least restrictive means in abridging religious liberty rights. RFRA § 3(b). "Demonstrate" is defined as "the burden[] of going forward with the evidence and of persuasion." RFRA § 5(b)(3). Similar to the Adarand absence of proof justifying the EEO regulations, the FCC has made no demonstration that a compelling reason exists for the application of these racial hiring/recruitment standards to *any* First Amendment activity.

Consequently, pursuant to RFRA, the FCC must demonstrate a compelling interest for impinging upon the religious liberty rights of religious broadcasters through the application of the EEO requirements in the new guidelines. Because no such evidentiary basis exists, no compelling interest exists which would justify the imposition of the type of strictures the FCC hopes to impose through the application of this standard. Ultimately, the guidelines would fall under a RFRA challenge.

VII. RELIGIOUS ORGANIZATIONS CANNOT CONSTITUTIONALLY BE REQUIRED TO FORGO THEIR RELIGIOUSLY DETERMINED STRUCTURES AS A PREREQUISITE TO MAINTAINING A BROADCAST LICENSE

Paragraph 9 of the new guidelines shows a remarkable obtuseness concerning the standards enunciated in Amos. Rather than lessen the burden placed on religion by the government, the guidelines increase the burden. There is simply no other manner for paragraph 9 of the guidelines to be implemented, other than by close monitoring of religious broadcasters by the FCC. The guidelines propose to allow government officials the ability to evaluate the hiring of co-religionists, and determine "if there is evidence of lack of compliance, and take appropriate action if violations have occurred." The problem is that both the proposed monitoring and the proposed evaluations to be made thereon are unconstitutional.

The Supreme Court has reiterated the oft repeated principle that "religious freedom encompasses the power of religious bodies to decide for themselves, free from state interference, *matters of church government* as well as those of faith and doctrine." Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 722 (1976) (emphasis added); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952). The application of the FCC's EEO standard through monitoring and evaluation *is* tantamount to a state intrusion into the governmental affairs of a church.

For example, in Amos, a janitor at a non-profit Mormon gymnasium was fired because he was not a Mormon. Amos, 483 U.S. at 330. The janitor sued the Mormon Church claiming "religious discrimination" under Title VII, because his duties as a gymnasium janitor were too attenuated to be described as a governmental affair of the Mormon Church. Id. at 331. In unanimously rejecting the claim, the Supreme Court reiterated the principle that religious groups are in the best position to determine what is important to their structure and function:

> it is a significant burden on a religious organization to require it . . . to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.

Id. at 336. To avoid such determinations, the Court stated plainly that religious groups must be accommodated without State intervention in these areas: "There is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist *without sponsorship and without interference*." Id. at 334 (citation and internal quotation marks omitted, emphasis added). In other words, by entering the stream of commerce, as the Mormon Church did in Amos, religious institutions do not give up the right to make determinations about their own internal structure. Similarly, religious institutions that are Commission licensees can not be forced to give up these rights.

Paragraphs 6-8 of the new guidelines do not create an exemption from the EEO regulations, they simply offer religious broadcasters the ability to use religious affiliation as a job qualification. Under the banner of "diversity" the FCC is not empowered to meddle in the religious affairs of religious broadcasters, however. The Amos Court held, for example, that Section 702 of Title VII was constitutional because it was, "a statute neutral on its face and motivated by a *permissible*

purpose of limiting governmental interference with the exercise of religion . . . ." Amos, 483 U.S. at 339 (Emphasis added).

The Amos decision was based upon constitutional principles, not simply those principles embodied by Congress in Section 702. As Justice Brennan stated in concurrence:

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.
>
> ***The authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on free exercise rights****, since a religious organization is able to condition employment in certain activities on subscription to particular religious tenets.*

483 U.S. at 342 (Brennan, J., concurring) (emphasis added). The idea that the Constitution *requires* a government agency not to become entangled in the structure of religious organizations is a theme throughout Amos, unanimously embraced by the Court.

The Free Exercise Clause "withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." Abington School District v. Schempp, 374 U.S. 203, 222 (1963). "[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: *select their own leaders*, define their own doctrines, *and run their own institutions*." Amos, 483 U.S. at 341 (Brennan, J., concurring) (citations and internal quotation marks omitted, emphasis added). The principle is simple -- once one government agency is unfettered by constitutional constraints to dictate the structure of religious

organizations, all government agencies are unconstrained to invade the province of the Church. Therefore, the FCC does not enjoy a special dispensation in ordering the affairs of religious organizations as a pretext for obtaining or maintaining a broadcast license.

In Little v. Weurl, 929 F.2d 944 (3rd Cir. 1991), the Third Circuit held that a Catholic school was exempted from a Title VII discrimination lawsuit for firing a teacher who divorced and remarried. In holding that applying Title VII to such church related activities would violate the Free Exercise and Establishment Clauses, the Court stated: "Quite apart from whether a regulation requires a church or an individual believer to violate religious doctrine or felt moral duty, churches have a ***constitutionally protected*** interest in managing their own institutions free of government interference." Little, 929 F.2d at 948 (emphasis added).

Similarly, in EEOC v. Presbyterian Ministries, Inc., 788 F. Supp. 1154 (W.D. Wash. 1992), the court rejected an assertion similar to the FCC's here. The Presbyterian Ministries court held that a Christian retirement home was not liable under Title VII for religious discrimination for firing a Muslim woman, because her religious activities did not comport with the Christian atmosphere of the home. The Court held that the Section 702 religious "exemption alleviates significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Presbyterian Ministries, 788 F. Supp. at 1157. The court also noted that, "the § 702 exemption exists to prevent such [governmental] intrusions ***and prevent an Establishment Clause violation***." Id. (Emphasis added). In other words, the purpose of § 702 (and the FCC's rules here), is to prevent unconstitutional government entanglement in religious affairs.

At its essence, the application of a recruitment/hiring standard to a religious organization which requires that organization to hire outside of the faith necessarily penalizes that organization for a relationship, which under other circumstances, would be constitutionally protected. "It is too

late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." Sherbert v. Verner, 274 U.S. 398, 405 (1963). Consequently, the race/gender hiring/recruitment requirement which fails to account for the religious requirements of a particular religious broadcaster violates the constitutional principles enunciated in Amos.

Finally, the interstitial intra-religion monitoring proposed in paragraph 9 of the guidelines to assure compliance with the EEO regulations is unconstitutional. The Establishment clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." Everson v. Board of Educ., 330 U.S. 1, 18 (1947). On the contrary, "[s]tate power is no more to be used to handicap religions, than it is to favor them." *Id.* The only method which the FCC could use in determining a "violation" of the EEO guidelines is a determination that the noncompliance with the EEO regulations was not sufficiently related to the religious purposes of the religious broadcaster. In Widmar v. Vincent, 454 U.S. 263 (1981), the Supreme Court stated in an analogous context:

> [the State] would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove an impossible task in an age where many various beliefs meet the constitutional definition of religion . . . . There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

454 U.S. at 272 n.11. Similarly, the FCC would have to make determinations about whether a religious broadcaster's hiring and recruitment decisions were sufficiently encompassed within his religious prerogatives to pass muster, and accomplish this through some type of intra-religious monitoring. If "it is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds," Employment

Division v. Smith, 494 U.S. 872, 887 (1990), then it is equally outside of the purview of the FCC to enter into such constitutionally protected territory.

Conclusion -

For the reasons set forth above, Petitioners respectfully request the following:

1. That new rules be drafted which comport with the First Amendment and the standards set forth in Amos and Adarand;
2. That actual rules, rather than "guidelines" be adopted;
3. That the proposed rules be published with due notice in the Federal Register as a proposed rulemaking, to fulfill the requirements of the APA; and
4. That all Federal Communications Commission EEO standards for religious broadcasters be dropped.

The FCC's reluctance to cede authority in this area is well documented by its apparent adoption of these guidelines as an eleventh hour response to a pending ruling by the D.C. Circuit in the Lutheran Church/Missouri Synod case, and by the language of the guidelines themselves. The Agency did not serve its litigation purposes by incrementally attempting to adopt an ineffective measure which is inapplicable to half of the broadcasting community.

Petitioners respectfully submit that this attempt to reform the FCC's prior restrictive stance with regard to religious broadcasters is unconstitutional.

Respectfully submitted,

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